IN THE

Supreme Court of the United States

October Term, 1978

No. 78-725

SOVEREIGN CONSTRUCTION COMPANY, LTD.,
Petitioner,

v.

CITY OF PHILADELPHIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner Sovereign Construction Company, Ltd. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on August 8, 1978.

Opinion Below

The opinion of the Court of Appeals, not yet reported, appears in Appendix "A" hereto. The opinion of the United States District Court for the Eastern District of Pennsylvania is reported in 439 F.Supp. 692 (E.D. Pa. 1977), and appears in Appendix "B" hereto.

Jurisdiction

The judgment of the Court of Appeals for the Third Circuit was entered on August 8, 1978. This petition was filed with 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Question Presented

Does the lowest responsive responsible bidder for construction of a Water Pollution Control Plant have standing to sue a City to obtain a Declaratory Judgment, Injunctive relief and a Mandatory Order requiring the City to award the construction contract to such low bidder where the Project is federally funded, pursuant to Title II of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1281-1293 (Supp. V. 1975), which the City has arbitrarily and capriciously refused to do?

Statutory Provisions and Regulations Involved

The following provisions of statutes of the United States and regulations of the Environmental Protection Agency are involved:

1. § 1281(a), § 1281(g) and § 1361(a) of Title II of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1281-1293 (Supp. V. 1975). See Appendix C.

2. EPA Regulation, 40 CFR 35.936-2(a). See Appendix D.

   EPA Regulation, 40 CFR 35.936-3. See Appendix E.

   EPA Regulation, 40 CFR 35.936-16(a). See Appendix F.

Statement of the Case

The jurisdiction of the District Court was invoked under 28 U.S.C. § 1332 because of the diversity of citizenship, the plaintiff being a citizen of the State of New Jersey and the defendant a citizen of the Commonwealth of Pennsylvania.

Sovereign in its Complaint also expressly asserted that its legal rights under Title II of the Federal Water Pollution Control Act Amendments of 1972, Public Law 92-500, 33 U.S.C. § 1281 *et seq.* and under the EPA grant administration regulations had been violated by the City's actions.

The plaintiff in this proceeding and the Petitioner herein, Sovereign Construction Company Ltd. (Sovereign) brought suit against City of Philadelphia (City) for Declaratory Judgment, Injunctive relief, and Mandatory Order because of the City's rejection of Sovereign's bid for construction of a Preliminary Treatment Building for a Water Pollution Control Project (Project). The City advertised for bids for general construction. The Project is being seventy-five percent federally funded, pursuant to Title II of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1281-1293 (Supp. V 1975) [FWPCA] and is designated Federal Grant No. C-420681-02. Bids were open December 16, 1975 by the City's Procurement Department. There were nine bidders. Sovereign's bid in the amount of $20,779,100 (Bid) was the lowest bid received. It was $507,900 less than the second low bidder, and $939,000 below the estimate of the City's own Engineer. Because of an alleged "imbalance" in Sovereign's bid, the City sought to initiate action to rebid the Project. Sovereign, acting in accordance with the United States Environmental Protection Agency (EPA) regulations, secured the intervention of the EPA Regional Administrator for Region III, who advised the City that EPA grant regulations required the City to afford Sovereign an op-

portunity to express its views. Following a meeting between representatives of the City and Sovereign, the City's Procurement Commissioner on April 9, 1976 reaffirmed his initial decision to reject all bids and to "rebid" the project. Sovereign, pursuant to EPA regulations, requested the Regional Administrator to review the adverse determination. A hearing was thereafter held at which both Sovereign and the City presented their respective facts and positions. On December 6, 1976, a detailed written "Determination of Regional Administrator" was handed down. It reviewed the factual and technical background of the problem. The Regional Administrator sustained the protest of Sovereign and reversed the determination of the City to reject all bids.

Notwithstanding the Administrator's Determination, the City refused and continues to refuse to award Sovereign a contract for the construction work.

Sovereign filed its Complaint in the United States District Court for the Eastern District of Pennsylvania, alleging the action of the City Procurement Commissioner is arbitrary and capricious, violative of the Federal Water Pollution Control Act Amendments of 1972, of EPA regulations and the law of Pennsylvania. The prayer of the Complaint is for a Declaratory Judgment, Injunctive relief and a Mandatory Order requiring the City to award sovereign the contract for the Project.

The City filed an Answer. Subsequently it filed its Motion seeking, *inter alia*, judgment on the Pleadings.

The District Court granted the City's Motion for Judgment on the Pleadings holding, in sort, that Sovereign failed to state a claim (under either federal or Pennsylvania law) upon which relief could be granted. Judgment was so entered.

The United States Court of Appeals for the Third Circuit affirmed the judgment of the District Court.

Reasons for Granting the Writ

Grants from the federal government have been, and will continue to be a major source of funds for state and local governments. In a special analysis published by the Office of Management and Budget concerning federal aid to state and local governments it was estimated that under the government's 1979 budget, grants will probably account for about one-sixth of total federal spending—which will translate into over one-fourth of the funds expended by the state and local recipients of those grants—the grantees. Cities are expected to receive $55 billion in 1979, compared with $51 billion in 1978 and $44 billion in 1977. A substantial part of those sums of money will be for construction of public projects by state and local grantees.

The decision below presents a significant and recurring problem of national importance concerning the right of the lowest responsive responsible bidder to receive an award of a contract for construction of a project funded substantially by a grant of federal funds. The practice of withholding such an award from the lowest responsive responsible bidder is detrimental to the economics and national interest of our country. It creates a wasteful and inflationary impact which is detrimental not only to taxpayers but to every citizen.

In granting the City's Motion for Judgment on the Pleadings, the District Court implicitly held, and the Court of Appeals affirmed, that the City is immune from any legal action by the lowest responsive responsible bidder for construction of a project which is being funded substantially by federal grant funds, notwithstanding its bid has been arbitrarily and capriciously rejected.

Sovereign pleaded arbitrary and capricious rejection of its bid by the City through abuse of discretion. Such rejection is

admitted of record by the pleadings which govern disposition of the Motion for Judgment on the pleadings.

Arbitrary and capricious abuse of power does not merit immunity from and protection of law regardless of whether the aggrieved party is a taxpayer or a bidder on a public project—state or federal. That there are limitations to carte blanche toleration of arbitrary abuse of official power in instances involving federal grant funds, not dependent on taxpayer action, should be enunciated clearly in federal decisions, and at the highest level.

The Court of Appeals for the Third Circuit affirmed the District Court, holding Sovereign had failed to state a claim upon which relief could be granted. This petition for a Writ of Certiorari undertakes to present for consideration only the federal aspect of the legal rights to which Sovereign claims entitlement.

This petition affecting a successful bidder to a grantee of FWPCA funds is of precedential importance. It brings before this Court the case of a successful bidder for a construction project, substantially funded for a City grantee by FWPCA funds, which is being arbitrarily and capriciously denied the award of a contract to which the Regional Administrator has found it is entitled. Notwithstanding arbitrary and capricious action by the City, and a formal Determination by the Regional Administrator of Sovereign's right to an award of the contract for construction of the federal funded Project, the Court below held Sovereign has no standing or recourse under federal law to sue the City for enforcement of an award.

The Regional Administrator's Determination was favorable to Sovereign. Had Sovereign *not* prevailed before EPA, Sovereign would have recourse to the Federal District Court for remedial relief under the Administrative Procedure Act

(APA) and could prevail in that court. Paradoxically, since Sovereign did prevail before EPA and is a successful party in interest, it has been rendered legally impotent, in the same or any other court, to enforce observance of its legal rights. If a party whose cause *has not prevailed* before a government agency is accorded access to a federal court under the APA, it is inconceivable that a party whose cause *has prevailed* should be denied access to the same court for the protection of that cause—albeit not by proceeding under the procedure of the Administrative Procedure Act.

Sovereign pleaded the City's Federal Grant No. C-420681.02 as well as the FWPCA and pertinent EPA regulations as a basis for its cause of action in the federal Court for enforcement of its Bid. The Determination of the Regional Administrator has also been pleaded and is incorporated in Sovereign's Answer to the City Motion for Dismissal. The latter are replete with references to requirements of FWPCA and EPA regulations, and policy governing the obligations of Grantees relating to award of contracts, the enforcement of which Sovereign seeks in the federal Court. Sovereign has been found by EPA, an agency of the federal government, to have legal right to award of the contract. Certainly, even if only on the basis of diversity, the federal Court is the appropriate forum in which to enforce that right which the City is violating.

The rejection of all bids after they have been opened tends to discourage competition because it results in making all bids public without award, which is contrary to the interest of the low bidder, and because rejection of all bids means that bidders have expended manpower and money in preparation of their bids without the possibility of acceptance. Arbitrary rejection of all bids has the inevitable effect of discouraging responsible bidders from dealing with the federal grantee and instead encourages the submission of tentative bids by less

responsible bidders the first time around to find out what one's competitors are bidding, with the knowledge that the grantee can and will reject all bids, and on the second time around the tentative bidder will know what his competition intends to bid. The adverse impact of such practice on a national scale discourages competitive bidding for projects which are being funded by federal grants involving many billions of dollars annually.

To counteract such damaging practice it is EPA policy to encourage and require free and open competition appropriate to the type of project work to be performed: 40 CFR § 35.936-3. The grantee is required to maintain a code or standard of conduct to govern the *performance* of its employees in the conduct of project work, including procurement and the expending of project funds, to avoid *noncompetitive* procurement *practices* which restrict or eliminate competition or otherwise restrain trade: 40 CFR § 35.936-16(a). The arbitrary rejection of a bid is certainly a noncompetitive procurement practice tending to restrict or eliminate competition or otherwise restrain trade, and a violation of express EPA regulations which implement the statute granting federal assistance.

A bidding contractor should be accorded opportunity to protect its interest in the competitive bidding system in which it is participating if that system is to be successful. It can succeed only if the participants in that system have access to judicial enforcement of an award when they are the lowest responsive responsible bidder.

Jurisdiction to conduct judicial review of Government *agency* action may be invoked by a bidder in the area of *direct federal procurement*. That now is an established rule of law. Why should a successful bidder on a federally funded project be precluded from invoking the Court's exercise of such jurisdiction?

Where a bidder on a contract under a federal grant does not receive a contract because the federal grantee does not follow federal regulations, the successful bidder is not less "aggrieved" than a bidder for a contract which is refused an award by the federal government making a direct procurement. There is no substantive difference between the injuries suffered by Sovereign as a successful bidder for a contract funded by federal grant and injuries suffered by a successful bidder unlawfully refused an award by federal procurement authorities.

Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159 (C.A. 3rd Cir. 1971) Cert. Den. 404 US 854, 92 S.Ct. 98, 30 L.Ed. 2d 95 (1971) lends support to the position that a contractor, as a bidder on a federally assisted construction project, has standing to sue, albeit in that case the contractor's interest was being impacted by an Executive Order mandating compliance with a hiring plan.

In *Association of Data Processing Services v. Camp*, 397 US 150, 90 S.Ct. 827, 25 L.Ed. 184 (1970), the Court outlined the two-step test for determining standing to sue—namely—will the challenged act cause claimant injury economically or otherwise, and, is the claimant interest within the zone protected by statute. Also, in *Barlow v. Collins*, 397 US 159, 90 S.Ct. 832, 25 L.Ed. 2d 192 (1970) it was held that the regulations issued under a statute must be considered in determining if an interest is "arguably" within the zone of interests to be protected by that statute.

Palpable economic injuries have long been recognized as sufficient to lay the basis for standing, *with or without a specific statutory provision* for judicial review: *Sierra Club v. Morton*, 405 US 727, 92 S.Ct. 1361, 31 L.Ed. 2d 636 (1972).

Conclusion

The Supreme Court of the United States is petitioned to decide the standing and legal right of the lowest responsible responsive bidder, which is being arbitrarily and capriciously denied the award of a public contract by the grantee of more than twenty million dollars of federal funds for construction of a FWPCA project. The federal granting agency, EPA, has determined that bidder, Sovereign, to be entitled to the award. An important public interest of national scope can be served by the grant of a Writ in this case.

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

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APPENDIX "A"

Judgment Order—Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-2613

SOVEREIGN CONSTRUCTION COMPANY, LTD.,
Appellant,

vs.

CITY OF PHILADELPHIA.

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D. C. Civil No. 77-739)

Argued
August 8, 1978
Before: ALDISERT, VAN DUSEN and HUNTER,
Circuit Judges.

JUDGMENT ORDER

After consideration of all contentions raised by appellant, and for the reasons set forth in the district court opinion by The Honorable Alfred L. Luongo, 439 F. Supp. 692 (E.D. Pa. 1977), it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,

ALDISERT,
Circuit Judge.

Attest:

M. Elizabeth Ferguson
Acting Clerk

Dated: August 8, 1978

APPENDIX "B"

Opinion and Order—U.S. District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SOVEREIGN CONSTRUCTION COMPANY, LTD.,

v.

CITY OF PHILADELPHIA.

CIVIL ACTION NO. 77-739

OPINION

Luongo, J. October 31, 1977

Plaintiff, Sovereign Construction Company, Ltd., brought this diversity action against the City of Philadelphia to resolve a dispute arising out of the City's handling of bids for construction work on the Preliminary Treatment Building at the City's Northeast Water Pollution Control Plant. As will appear from the statement of facts below, nearly two years have elapsed since the City received bids on the work in question. To date the City has not awarded a contract for this work to any bidder. Early construction of the Preliminary Treatment Building will clearly be in the public interest. Therefore, although I have carefully considered the arguments presented by both parties, I will issue only a brief opinion in order that the ultimate resolution of this controversy may be hastened.

The case is before me on the City's motion for judgment on the pleadings, Fed.R.Civ.P. 12(c), and so "all well-pleaded material allegations of the opposing party's pleading are to be taken as true, and all allegations of the moving party which have been denied are taken as false." 2A Moore's Federal Practice ¶ 12.15, at 2343 (2d ed. 1948) (collecting cases) (footnote omitted). With this background in mind, the essential facts of this case are as follows.

Pursuant to its published invitation for bids, the City, on December 16, 1975, received and opened nine bids, including one submitted by plaintiff, for work on the Preliminary Treatment Building. Complaint ¶¶ 7, 11. This project is seventy-five percent federally funded, pursuant to Title II of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1281-1293 (Supp. V 1975). Plaintiff's bid of $20,779,100 was the lowest bid received by the City. *Id.* ¶ 12. Because of an alleged "imbalance" in plaintiff's bid, the City then sought to "rebid" the project. Plaintiff secured the intervention of the EPA's Regional Administrator for Region III, who advised the City that EPA grant regulations required the City to afford plaintiff an opportunity to express its views. *See* 40 C.F.R. § 35.939(d) (1976). Following a meeting between the City and Sovereign, the City's Procurement Commissioner on April 9, 1976 reaffirmed his initial decision to reject all bids and to "rebid" the project. *Id.* ¶¶ 14-15. Sovereign again turned to the EPA for redress. On December 6, 1976, a detailed written "Determination of Regional Administrator"[1] was handed down. After considering and rejecting the City's argument that Pennsylvania law rather than federal law should govern the bid dispute,[2] the Regional Administrator concluded: "For the foregoing reasons I sustain the protest of Sovereign Construction Company, Ltd., and hereby reverse the determination of the City of Philadelphia to reject all bids." The EPA grant regulations preclude any further administrative appeal from this Determination. 40 C.F.R. § 35.939(e)(3) (1976). Notwithstanding the Administrator's Determination, "the City has refused and continues to refuse to award Sovereign a contract" for the construction work. Complaint ¶ 21.

[1] This appears in the record as Exhibit A to Plaintiff's Answer to Defendant's Motion.

[2] The City relied on 40 C.F.R. §§ 35.936-2 and 35.936-10(1976) in support of its position.

Sovereign filed this complaint on March 1, 1977, alleging that the City's actions are arbitrary and capricious, violative of the Federal Water Pollution Control Act Amendments of 1972, violative of EPA regulations, violative of Pennsylvania law, and an abuse of discretion, and seeking an order requiring the City to award it the contract for the Preliminary Treatment Building. *Id.* ¶¶ 26, 33. The City filed an answer, and subsequently filed this motion seeking, *inter alia,* judgment on the pleadings.

In their memoranda of law, the parties focus on the "well-settled rule" of Pennsylvania law that an unsuccessful bidder may not sue to secure an award of the disputed contract. *Weber v. Philadelphia,* 437 Pa. 179, 181 n.2, 262 A.2d 297, 299 (1970) (separate footnote of Jones, J.); *see, e.g., Pullman, Inc. v. Volpe,* 397 F. Supp. 432, 442 (E.D. Pa. 1971). Plaintiff seeks to circumvent this rule by (1) restating it as a rule of standing, and (2) arguing that the federal law of standing should control in this case. To this end, plaintiff relies on such decisions as *Scanwell Laboratories, Inc. v. Shaffer,* 424 F.2d 859, 861-73 (D.C. 1970), and *Darin & Armstrong, Inc. v. United States Environmental Protection Agency,* 431 F. Supp. 456 (N.D. Ohio), *vacated mem. and remanded,* 542 F.2d 1175 (6th Cir. 1976),

which involved standing to sue in federal-question cases under the Administrative Procedure Act. These decisions do not aid plaintiff, however, because the Pennsylvania rule adverted to earlier is not only a rule of standing, but also a rule of substantive law. As stated in one recent opinion of the Pennsylvania Supreme Court, the rule is that "a disappointed bidder has sustained no personal injury which entitles him to redress in court." *R.S. Noonan, Inc. v. York School Dist.*, 400 Pa. 391, 394, 162 A.2d 623, 625 (1960), *quoted with approval in Weber v. Philadelphia*, 437 Pa. 179, 181 n.2, 262 A.2d 297, 299 (1970) (separate footnote of Jones, J.). In short, a disappointed bidder has no cause of action under Pennsylvania law. *Accord, Commonwealth ex rel. Snyder v. Mitchell*, 82 Pa. 343, 350-51 (1876) (alternative holding). Accordingly, plaintiff could not prevail on a state law theory even if I were to determine that plaintiff has standing in this case. I therefore need not decide whether state or federal law controls on the issue of "prudential" standing in this diversity case. *See generally Hanna v. Plumer*, 380 U.S. 460 (1965); *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

Plaintiff also seeks to avoid this rule of law through the following argument:

> "Plaintiff is not suing as a disappointed bidder. It sues to preserve its legal right as the lowest responsible bidder on a federal funded construction project entitled, by federal and state law to an award of the contract, and so determined to be by the Environmental Protection Agency. Plaintiff sues for an award of that contract which is being denied to it by the defendant, acting by and through its Procurement Commissioner, who has by an abuse of discretion and for divers other reasons, arbitrarily and capriciously refused to award a contract to Sovereign for construction of the Project." Plaintiff's Memorandum of Law Contra Defendant's Motion, at 2.

As I understand it, the argument is that a bidder who is legally entitled to the award of a contract and is wrongfully denied that award cannot be viewed as a "disappointed bidder," because that term applies only to a bidder who (1) is *not* the lowest responsible bidder, and (2) is therefore not awarded the contract, Plaintiff's restrictive interpretation of the term "disappointed bidder" is at odds, however, with the interpretation given that term by the Pennsylvania Supreme Court. In *R.S. Noonan, Inc. v. York School District*, 400 Pa. 391, 162 A.2d 623 (1960), for example, the court considered a dispute growing out of the District's invitation for competitive bids on the construction of a new school building. Plaintiff, Noonan, Inc., was the lowest bidder on the project. The District then rejected all bids, solicited new bids, and awarded the contract to another firm that submitted the lowest bid on the second round. Noonan, Inc., alleging that the District "was guilty of bad faith, arbitrary action, and abuse of discretion in rejecting its bid," sought an order that the contract be awarded to it instead. 400 Pa. at 393, 162 A.2d at 624. Justice Musmanno's opinion for the court stated the controlling principle in this fashion: "As early as 1876, this Court held . . . that a disappointed bidder has sustained no personal injury which entitles him to redress in court." 400 Pa. at 394, 162 A.2d 625. Justice Musmanno's discussion of *Heilig Bros. Co. v. Kohler*, 366 Pa. 72, 76 A.2d 613 (1950), also confirms that the term "disappointed bidder" embraces any unsuccessful bidder, *i.e.*, any bidder who was not awarded the contract at issue. *See Highway Express Lines, Inc. v. Winter*, 414 Pa. 340, 346, 200 A.2d 300, 303 (1964) (by implication).

The unavoidable conclusion is that Sovereign Construction Company is here as a disappointed bidder; Sovereign therefore has no cause of action against the City under Pennsylvania law.

Sovereign also asserts that its legal rights under the Federal Water Pollution Control Act Amendments of 1972 and under the EPA grant administration regulations have been violated by the City's actions. Sovereign points to no specific regulation or statutory provision as the source of its federal cause(s) of action, and, indeed, has not invoked this court's federal-question jurisdiction. I have examined the 1972 Amendments in light of *Cort v. Ash*, 422 U.S. 66 (1975), and I have concluded that no private right of action in a disappointed bidder may be implied from the Amendments. In *Cort*, the Supreme Court stated:

> "In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted'—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?" 422 U.S. at 78 (citations omitted).

These four factors may be applied to the 1972 Amendments in a straightforward fashion. First, the 1,766-page legislative

history is utterly devoid of any indication that Congress enacted Title II of the Amendments for the *especial* benefit of private contractors working on projects funded under that title. *See* Senate Comm. on Public Works, Federal Water Pollution Control Act Amendments of 1971, S. Rep. No. 92-414, 92d Cong., 1st Sess. (1971); House Comm. on Public Works, Federal Water Pollution Control Act Amendments of 1972, H.R. Rep. No. 92-911, 92d Cong., 2d Sess. (1972).[3] Second, although the legislative history does not address this issue, the absence from the Amendments' broad provision on citizen suits of any colorable authorization for a private right of action in a disappointed bidder gives rise to an inference that Congress did not intend to create such a right. *See* 33 U.S.C. § 1365 (Supp. IV 1974). Third, the purpose of Title II—the development of treatment works that will satisfy the Amendments' very rigorous timetable for pollution reduction[4]—would almost certainly be frustrated by the creation of an additional[5] avenue of review of grantees' bid decisions, for such review could work to delay the construction of a treatment plant while a disappointed bidder pursued his remedies. Fourth, a federal right of action against a state or municipal grantee would be anomalous, if not inappropriate, since state and municipal contracts have traditionally been governed by state law. Although contracts funded in part by the federal government under Title II of the Amendments are not traditional contracts, I am not persuaded that the injection of

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[3] Both the House and the Senate reports are reprinted in Environmental Policy Division of the Congressional Research Service of the Library of Congress, 93d Cong., 1st Sess., A Legislative History of the Water Pollution Control Act Amendments of 1972 (Comm. Print 1973).

[4] *See* 33 U.S.C. § 1281(a) (Supp. IV 1974); *id.* § 1251(a) (Supp. IV 1974).

[5] *See* 40 C.F.R. §§ 35.939, 35.965 (1976).

federal dollars into a contract between a city and the low bidder requires all issues of procurement law that arise out of that contract to be determined by federal law, absent a federal statute or regulation that expressly or impliedly requires such a result. Thus, upon consideration of the four *Cort v. Ash* factors, I conclude that no private right of action in a disappointed bidder may be implied from the 1972 Amendments.

Any argument that the EPA grant regulations themselves support an implied private right of action runs up against (1) the question whether the EPA has the power to create by regulation a new cause of action, and (2) the enforcement provision of the EPA grant regulations, which spells out various sanctions (not including actions by bidders) to be imposed on an uncooperative grantee.[6] As the second issue is dispositive, I need not address the first. The enforcement provision of the EPA regulations, set out in note 6, *supra*, clearly contemplates that the Regional Administrator alone shall determine what sanctions, if any, are to be imposed on a grantee for noncompliance with other EPA regulations. Moreover, the regulation does not purport to expand the range of available judicial remedies; rather, it states that the Regional Administrator may, if he deems it "appropriate," pursue such remedies. In short, part 35 of the EPA regulations affords no basis for implying a private right of action in a disappointed bidder.

[6] The enforcement provision of the EPA regulations is as follows:

"§ 35.965 *Enforcement.*

Noncompliance with the provisions of this subpart shall be cause for any one or more of the following sanctions, a determined appropriate by the Regional Administrator:

(Footnote continued on following page)

Sovereign in effect seeks enforcement of the Regional Administrator's Determination in its favor. It therefore cannot rely on the Administrative Procedure Act for its cause of action, as Sovereign is plainly not "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702 (1970), *as amended by* Act of Oct. 21, 1976, Pub. L. No. 94-574, 90 Stat. 2721. Absent a statutory provision giving Sovereign an express or implied right of action, I have no authority to "enforce" the Regional Administrator's Determination against the City.

As a practical matter, the EPA will undoubtedly have the final word in this matter, inasmuch as a federal grant is providing seventy-five percent of the funds needed to com-

(Footnote continued from preceding page)

(a) The grant may be terminated or annulled pursuant to § 30.920 of this subchapter;

(b) Project costs directly related to the noncompliance may be disallowed;

(c) Payment otherwise due to the grantee of up to ten percent (10%) may be withheld (see § 30.615-3 of this subchapter);

(d) Project work may be suspended pursuant to § 30.915 of this subchapter;

(e) A noncomplying grantee may be found nonresponsible or ineligible for future Federal assistance or a noncomplying contractor may be found nonresponsible or ineligible for approval for future contract award under EPA grants;

(f) An injunction may be entered or other equitable relief afforded by a court of appropriate jurisdiction;

(g) Such other administrative or judicial action may be instituted as may be legally available and appropriate."

plete the Preliminary Treatment Building. The Regional Administrator may decide that the City's actions warrant the imposition of one or more of the sanctions listed in the EPA grant administration regulations, 40 C.F.R. § 35.965 (1976). From Sovereign's perspective, this potential administrative enforcement is understandably less satisfactory than prompt injunctive relief. Furthermore, from the standpoint of the public interest in reducing or eliminating water pollution, early construction of the Preliminary Treatment Building is of the utmost importance. I cannot, however, recognize a private right of action where neither Congress nor the EPA has done so.

Because Sovereign has failed to state a claim (under either federal or Pennsylvania law) upon which relief can be granted, the City is entitled to judgment in its favor. The City's motion for judgment on the pleadings will be granted, and judgment will be entered for the City. *See* Fed.R.Civ.P. 12(h)(2).

ALFRED L. LUONGO,
J.

Order

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SOVEREIGN CONSTRUCTION COMPANY, LTD.,

v.

CITY OF PHILADELPHIA.

CIVIL ACTION NO. 77-739

This 31st day of October, 1977, it is

ORDERED that the Motion of defendant, City of Philadelphia, for Judgment on the Pleadings is GRANTED.

ALFRED L. LUONGO,
J.

APPENDIX "C"

Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1281(a) and (g) (1); § 1361(a)

FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, 33 U. S. C. §§ 1281-1293 (Supp. V. 1975)

SUBCHAPTER II—GRANTS FOR CONSTRUCTION OF TREATMENT WORKS

§ 1281. *Congressional declaration of purpose*

(a) It is the purpose of this subchapter to require and to assist the development and implementation of waste treatment management plans and practices which will achieve the goals of this chapter.

*
*
*

(g)(1) The Administrator is authorized to make grants to any State, municipality, or intermunicipal or interstate agency for the construction of publicly owned treatment works.

*
*
*

SUBCHAPTER V—GENERAL PROVISIONS

§ 1361. *Administration—Authority of Administrator to prescribe regulations*

(a) The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter.

Appendix "E"—Environmental Protection Agency Regulation 40 CFR §35.936-3 Competition.

APPENDIX "D"

Environmental Protection Agency Regulation 40 CFR § 35.936-2 Grantee Procurement Systems; State or local law

40 CFR—ENVIRONMENTAL PROTECTION AGENCY RULES AND REGULATIONS

PART 35—STATE AND LOCAL ASSISTANCE

Procurement Under Grants For Construction of Treatment Works

40 CFR § 35.936-2 *Grantee Procurement Systems; State or local law.*

(a) Grantees may use their own procurement systems and procedures which meet applicable requirements of State, territorial or local laws and ordinances to the extent that such systems and procedures do not conflict with minimum requirements set forth in this subchapter.

APPENDIX "E"

Environmental Protection Agency Regulation 40 CFR § 35.936-3 Competition

40 CFR—ENVIRONMENTAL PROTECTION AGENCY RULES AND REGULATIONS

PART 35—STATE AND LOCAL ASSISTANCE

40 CFR § 35.936-3. *Competition.*

It is the policy of the Environmental Protection Agency to encourage free and open competition appropriate to the type of project work to be performed.

APPENDIX "F"

Environmental Protection Agency Regulation
40 CFR § 35.936-16 Code or standards of conduct

40 CFR—ENVIRONMENTAL PROTECTION AGENCY
RULES AND REGULATIONS

PART 35—STATE AND LOCAL ASSISTANCE

40 CFR § 35.936-16 *Code or standards of conduct.*

(a) The grantee must maintain a code or standards of conduct which shall govern the performance of its officers, employees, or agents in the conduct of project work, including procurement and the expending of project funds. The grantee's officers, employees or agents shall neither solicit nor accept gratuities, favors or anything of monetary value from contractors or potential contractors. The grantee must avoid personal or organizational conflicts of interest or non-competitive procurement practices which restrict or eliminate competition or otherwise restrain trade.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-725

SOVEREIGN CONSTRUCTION COMPANY, LTD., *Petitioner*

v.

CITY OF PHILADELPHIA, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court (App. B of Petition) is reported at 439 F.Supp. 692 (E.D. Pa. 1977). The Court of Appeals for the Third Circuit affirmed without opinion. The judgment order of the Court of Appeals has been appended to the Petition as Appendix "A."

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

Does a private contractor have standing to pursue an action under Title II of the Federal Water Pollution Con-

trol Act Amendments of 1972, 33 U.S.C. §§1281-1293 (Supp. V 1975) where the only basis for jurisdiction alleged in its complaint is diversity of citizenship and where private contractors are not even arguably within the zone of interests protected by that title?

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Administrative Procedure Act, 5 U.S.C. §702 (1970), *as amended* by Act of October 21, 1976, Pub. L. No. 94-574, 90 Stat. 2721 and the Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500 (86 Stat. 816, 33 U.S.C. §1251 *et seq*) and the regulation involved (40 CFR 35.965) are set forth in the Appendix hereto.

STATEMENT OF THE CASE

On December 16, 1975, the Procurement Department of the City of Philadelphia, pursuant to its published invitation for public competitive bidding, received and opened nine (9) bids, including one submitted by plaintiff, on Bid No. 2497, for the general and mechanical work for the preliminary treatment building of the Northeast Water Pollution Control Plant. This project was to receive 75% funding from the Environmental Protection Agency, pursuant to Title II of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§1281-1293 (Supp. V 1975), while the remaining 25% of the project was to be funded from City sources. After full review of all bid documents, the City's Water Department determined two things: (1) that the apparent low bidder was Sovereign Construction Company; (2) that Sovereign's bid was unbalanced. From lengthy discussions with professional consultants, the Water Department was forced to conclude that the imbalance represented a serious and unwarranted

fiscal risk to the City. The Procurement Commissioner, based on his own review of all pertinent materials, independently reached the same conclusion, and on January 28, 1976, determined to reject all bids, readvertise, and hold another open competitive bidding.

Sovereign, having been notified of its rejection by the return of its bid security on February 5, 1976, requested through its attorney, that the EPA's regional administrator for Region III intervene. Upon hearing from EPA of the pending bid protest, the City, through its legal representative, the City Solicitor's Office, arranged for a meeting of the interested parties. On March 17, 1976, with representatives of the City's Water and Procurement Departments and the Solicitor's Office present, Sovereign was given the opportunity to express its views and the reasons for the City's decisions were explained. Following this meeting, the City again carefully reviewed all pertinent data. On April 19, 1976, the City's Procurement Commissioner notified the parties involved that the City's best interest required him to reject all bids and readvertise the project.

Thereafter, on April 19, 1976, Sovereign requested EPA's regional administrator to review the City's determination and a week later, the City moved for summary dismissal of the protest.

After a hearing on the matter, on December 6, 1976, the EPA at last issued its "Determination of Regional Administrator." After rejecting the City's arguments that Pennsylvania law rather than federal law should govern the dispute and that EPA's reliance on an EPA internal memorandum and substitution of its own judgment for that of the City clearly violated the grant regulations as well as State and local law, the Regional Administrator sustained Sovereign's protest and reversed the City's determination to reject all bids. On December 17, 1976, the City appealed the decision to the General Accounting Office pursuant to the GAO's opinion of September 12, 1975, 40 *Federal Register* 42406, concerning grant dispute jurisdiction. Before the GAO could rule on the matter, Sovereign

filed its Complaint on March 1, 1977, seeking the Court below to order that the disputed contract be awarded to it. The City then filed its Answer in response.

Thereafter, the City filed its Motion for Judgment on the Pleadings. Sovereign filed an Answer and Memorandum and Supplemental Memorandum and the City (with leave of the Court) filed a Supplemental Memorandum in answer thereto.

By opinion and order of October 31, 1977, the District Court granted the City's Motion. Although the City contended that Sovereign did not have standing to pursue this action, the Court concluded that Sovereign had no cause of action under either Pennsylvania or federal law and accordingly determined that it was unnecessary to reach the issue of "prudential" standing in this diversity case.

In relation to Sovereign's federal claim, the court noted that "Sovereign points to no specific regulation or statutory provision as the source of its federal causes of action, and, indeed has not invoked this Court's federal question jurisdiction," and further held that the Act did not provide an express right of action. Based upon an examination of the 1972 Amendments in light of *Cort v. Ash*, 422 U.S. 66 (1975), the Court held:

> I have concluded that no private right of action in a disappointed bidder may be implied from the Amendments.

The reasons given were that: (1) the 1,766 page legislative history was "utterly devoid of any indication that Congress enacted Title II of the Amendments for the *especial* benefit of private contractors;" (2) the absence of any reference to disappointed bidders in any of the broad provisions of the Amendments concerning rights of review indicated that Congress did not intend to create one; (3) the Congressional mandate respecting development of treatment works within the Amendment's "very rigorous timetable for pollution reduction" might well be frustrated were an additional avenue of review of bid decisions to be provided, in that such review could serve to delay construction while a disappointed bidder pursued his remedies through the courts; (4) state and municipal contracts have traditionally been governed by state law. On appeal the United States Court of Appeals for the Third Circuit affirmed "for the reasons set forth in the district court's opinion."

Although neither of the courts below addressed the issue of "prudential" standing, Sovereign apparently assumes that federal law is controlling on that question and further seeks to have this court determine its "standing to sue" thereunder (Petition, Question Presented). The lower court's determination that Sovereign does not have a federal cause of action is not challenged.

ARGUMENT

THE DECISION BELOW IS CLEARLY CORRECT

Since this case was brought in Federal Court solely on the basis of diversity of citizenship, the District Court was, in effect, sitting only as a court of Pennsylvania, and Pennsylvania law controls plaintiff's standing to pursue this action. *Pullman, Inc. v. Volpe*, 337 F. Supp. 432, 442 (E.D. Pa. 1971). See also *National Equipment Rental, Ltd. v. Reagin*, 338 F.2d 759, 762 (2nd Cir. 1964); *Erie R. Co. v. Tompkins*, 204 U.S. 64 (1938).

It is indisputably clear that a disappointed bidder does not have standing to sue in Pennsylvania where the relief sought is peculiar and individual to itself because a disappointed bidder has sustained no injury which entitles him to seek personal redress. *Comm. ex rel. Snyder v. Mitchell*, 82 Pa. 343 (1876).

The District Court could not have heard Sovereign's case on the merits. In *Highway Express Lines, Inc. v. Winter*, 414 Pa. 340, 200 A.2d 300 (1964), the Supreme Court of Pennsylvania affirmed the dismissal of separate equity actions instituted by the two low bidders after the City of Philadelphia had twice rejected all bids, stating:

> As disappointed and unsuccessful bidders, they have no standing to request the judicial award of a public contract. *Id.* at 346.

Moreover, the Court upheld the City's actions as within its "complete and plenary discretion to reject any and all bids in the City's best interests." *Id.* at 345.

Even assuming, arguendo, that federal-question jurisdiction had been invoked in Plaintiff's Complaint (it was not) and the question of standing is properly before this Court, Sovereign still has no standing under federal law to pursue its federal claim.

Preliminarily, it should be noted that the Regional Administrator's determination was favorable to Sovereign. Accordingly, Sovereign is not "[a] person suffering legal

wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. §702 (1970), *as amended* by Act of October 21, 1976, P.L. 94-574, 90 Stat. 2721 and it cannot rely on the Administrative Procedure Act (or the cases arising thereunder) as support on this issue. Furthermore, the facts of this case show that the EPA was not the party seeking bids for the Water Pollution Control Plant. The federal grant was made available to the City pursuant to Title II of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§1281-1293 (Supp. V 1975). Sovereign's injury, if any, derives from the allegedly unlawful conduct of the City in refusing it the contract. The EPA is in no way responsible for determination of the lowest responsible bidder, but was merely a source of revenue. *Shaw-Henderson, Inc. v. Schneider*, 335 F. Supp. 1203, 1212 (W.D. Mich. 1971) *aff'd* 453 F.2d 748 (6th Cir. 1971).

Turning to the issue of standing as developed by our courts, it is apparent that Sovereign has failed to demonstrate that the interest it seeks to protect is in any way within the zone of interests protected by the FWPCA. Section 1251(b) of the Act explicitly recognizes "the primary right and responsibility of the states in preventing and controlling water pollution;" the 1,766 page legislative history is conspicuously devoid of any reference to the rights of private contractors working on projects funded under Title II of the Act; and the sections specifically devoted to rights of review and citizens suits make no mention of bidding disputes.

The conclusion is inescapable that Congress intended to exclude the relation between a municipality and its contractors from coverage under the Act and leave that problem with the States, where it has traditionally resided. *Shaw-Henderson v. Schneider, supra*, fn. 1 at p. 213.

Finally, even assuming that the issue of standing was controlled by federal law and that the right of a private contractor in a bid dispute to seek the award of the contract is within the core of interests protected by the FWPCA,

Sovereign did not attempt to expressly state a federal cause of action. It did not point to any specific regulation or statutory provision as the source of its federal cause of action, it did not attempt to invoke federal-question jurisdiction and it does not now seek to have this Court review the determination of the court below that it failed to state a cause of action under federal law. Its sole claim to a federal cause of action rests on its assertion that the provisions of the Federal Water Pollution Control Act Amendments of 1972 Pub. L. No. 92-500, 86 Stat. 816, 33 U.S.C. §1251 *et seq.* should be enforced in its favor. Simply put, the Act does not contain an independent grant of subject matter jurisdiction.

In *Cort v. Ash*, 422 U.S. 66 (1975), this Court articulated the four factors relevant to a determination of whether a private remedy may be implied from a statute which, like the FWPCA, does not expressly grant one:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted"—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? *Id.* at 78 (citations omitted).

Applying the first factor, it is apparent that the protection of private contractors was not of congressional concern. As stated by the Court below:

> The 1,766 page legislative history is utterly devoid of any indication that Congress enacted Title II of the Amendments for the *especial* benefit of private contractors working on projects funded under that title.

> *See* Senate Comm. on Public works, Federal Water Pollution Control Act Amendments of 1971, S. Rep. No. 92-414, 92d Cong., 1st Sess. (1971); House Comm. on Public Works, Federal Water Pollution Control Act Amendments of 1972, H.R. Rep. No. 92-91, 92d Cong., 2d Sess. (1972)

The "Declaration of Goals and Policy," 33 U.S.C. §1251(a) instead recites that "[t]he objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." None of the national policy declarations that follow contain even a passing reference to private contractors.

Second, this Court in *Cort* held that where "it is at least dubious whether Congress intended to vest in the plaintiff class rights broader than those provided" by state law, the absence of any suggestion that the disputed provisions might give rise to a cause of action for damages is sufficient reason for concluding that they do not. *Id.* at 83-84. The FWPCA reveals a legislative intent to grant certain carefully delineated rights of review. (§§1319, 1365, 1369) and review of bid disputes is not included. To the contrary, Section 1251(b) of the Act cclearly states that the primary right and responsibility for eliminating pollution rests with the state and local governments and that the role of the federal government is to provide technical and financial support in connection therewith. Accordingly, the lower court correctly concluded:

> [T]he absence from the Amendments' broad provision on citizen suits of any colorable authorization for a private right of action in a disappointed bidder gives rise to an inference that Congress did not intend to create such a right.

Third, one of the stated purposes of the Act is to reduce paperwork and "to prevent needless duplication and unnecessary delay at all levels of government." 33 U.S.C. §1251(f). That purpose would undoubtedly be frustrated if an additional avenue of review were provided, in that construction of vital pollution control facilities might be

delayed indefinitely, while disappointed bidders on lucrative contracts (such as the one at bar) pursued their remedies through the federal courts.

Finally, disputes arising under state and municipal contracts have traditionally been relegated to state courts for determination in accordance with state law and the mere presence of federal dollars is an insufficient reason to create a federal right of action in an area of state concern, particularly after Congress has plainly stated its intent to recognize and preserve the primacy of state interest in that area. 33 U.S.C. §1251(b).

Accordingly, even were this Court, unlike the courts below, to determine the issue of standing in Sovereign's favor, Sovereign still does not have an actionable claim under federal law and the action of the district court in granting defendant's motion for judgment on the pleadings should be affirmed.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

James M. Penny, Jr.

Deputy City Solicitor
Counsel for Respondent

Date:

APPENDIX A

5 U.S.C. § 702 (1970), *as amended* by Act of Oct. 21, 1976, Pub. L. No. 94-574, 90 Stat. 2721 (Administrative Procedure Act)

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

Publ.L. 89-554, Sept. 6, 1966, 80 Stat. 392; Publ.L. 94-574, §1, Oct. 21, 1976, 90 Stat. 2721.

APPENDIX B

33 U.S.C. §§1251, 1319, 1365, 1369 (Federal Water Pollution Control Act Amendments of 1972)

SUBCHAPTER I—RESEARCH AND RELATED PROGRAMS

§ 1251. Congressional declaration of goals and policy

(a) The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State; and

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans.

(b) It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights

of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

(c) It is further the policy of Congress that the President, acting through the Secretary of State and such national and international organizations as he determines appropriate, shall take such action as may be necessary to insure that to the fullest extent possible all foreign countries shall take meaningful action for the prevention, reduction, and elimination of pollution in their waters and in international waters and for the achievement of goals regarding the elimination of discharge of pollutants and the improvement of water quality to at least the same extent as the United States does under its laws.

(d) Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency (hereinafter in this chapter called "Administrator") shall administer this chapter.

(e) Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

(f) It is the national policy that to the maximum extent possible the procedures utilized for implementing this chapter shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government.

(g) It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

June 30, 1948, c. 758, Title I, § 101, as added Oct. 18, 1972, Publ.L. 92-500, § 2, 86 Stat. 816, and amended Dec. 27, 1977, Publ.L. 95-217, § § 5(a), 26(b), 91 Stat. 1567, 1575.

§ 1319. Enforcement—State enforcement; compliance orders

(a) (1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title in a permit issued by a State under an approved permit program under section 1342 or 1344 of this title, he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall

bring a civil action in accordance with subsection (b) of this section.

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of permit conditions or limitations as set forth in paragraph (1) of this subsection are so widespread that such violations appear to result from a failure of the State to enforce such permit conditions or limitations effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the thirtieth day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such conditions and limitations (hereafter referred to in this section as the period of "federally assumed enforcement"), except where an extension has been granted under paragraph 5(B) of this subsection, the Administrator shall enforce any permit condition or limitation with respect to any person—

(A) by issuing an order to comply with such condition or limitation, or

(B) by bringing a civil action under subsection (b) of this section.

(3) Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by him or by a State or in a permit issued under section 1344 of this title by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

(4) A copy of any order issued under this subsection shall be sent immediately by the Administrator to the State in which the violation occurs and other affected States. In

any case in which an order under this subsection (or notice to a violator under paragraph (1) of this subsection) is issued to a corporation, a copy of such order (or notice) shall be served on any appropriate corporate officers. An order issued under this subsection relating to a violation of section 1318 of this title shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation.

(5) (A) Any order issued under this subsection shall be by personal service, shall state with reasonable specificity the nature of the violation, and shall specify a time for compliance not to exceed thirty days in the case of a violation of an interim compliance schedule or operation and maintenance requirement and not to exceed a time the Administrator determines to be reasonable in the case of a violation of a final deadline, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

(B) The Administrator may, if he determines (i) that any person who is a violator of, or any person who is otherwise not in compliance with, the time requirements under this chapter or in any permit issued under this chapter, has acted in good faith, and has made a commitment (in the form of contracts or other securities) of necessary resources to achieve compliance by the earliest possible date after July 1, 1977, but not later than April 1, 1979; (ii) that any extension under this provision will not result in the imposition of any additional controls on any other point or nonpoint source; (iii) that an application for a permit under section 1342 of this title was filed for such person prior to December 31, 1974; and (iv) that the facilities necessary for compliance with such requirements are under construction, grant an extension of the date referred to in section 1311(b)(1)(A) of this title to a date which will achieve compliance at the earliest time possible but not later than April 1, 1979.

(6) Whenever, on the basis of information available to him, the Administrator finds (A) that any person is in violation of section 1311(b)(1)(A) or (C) of this title, (B) that such person cannot meet the requirements for a time extension under section 1311(i)(2) of this title, and (C) that the most expeditious and appropriate means of compliance with this chapter by such person is to discharge into a publicly owned treatment works, then, upon request of such person, the Administrator may issue an order requiring such person to comply with this chapter at the earliest date practicable, but not later than July 1, 1983, by discharging into a publicly owned treatment works if such works concur with such order. Such order shall include a schedule of compliance.

Civil actions

(b) The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

§ 1365. Citizen suits—Authorization; jurisdiction

(a) Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation

under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

Statutory or common law rights not restricted

(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

Citizen

(g) For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

§ 1369. Administrative procedure and judicial review

(a) (1) For purposes of obtaining information under section 1315 of this title, or carrying out section 1367(e) of this title, the Administrator may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and he may administer oaths. Except for effluent data, upon a showing satisfactory to the Administrator that such papers, books, documents, or information or particular part thereof, if made public, would divulge trade secrets or secret processes,

the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of Title 18, except that such paper, book, document, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter, or when relevant in any proceeding under this chapter. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpena served upon any person under this subsection, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Administrator, to appear and produce papers, books, and documents before the Administrator, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(2) The district courts of the United States are authorized, upon application by the Administrator, to issue subpenas for attendance and testimony of witnesses and the production of relevant papers, books, and documents, for purposes of obtaining information under section 1314(b) and (c) of this title. Any papers, books, documents, or other information or part thereof, obtained by reason of such a subpena shall be subject to the same requirements as are provided in paragraph (1) of this subsection.

(b) (1) Review of the Administrator's action (A) in promulgating any standard of performance under section 1316 of this title, (B) in making any determination pursuant to section 1316(b) (1) (C) of this title, (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title, (D) in making any determination as to a State permit

program submitted under section 1342(b) of this title, (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, or 1316 of this title, and (F) in issuing or denying any permit under section 1342 of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person. Any such application shall be made within ninety days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such ninetieth day.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement.

(c) In any judicial proceeding brought under subsection (b) of this section in which review is sought of a determination under this chapter required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence. *June 30, 1948, c. 758, Title V, § 509, as added Oct. 18, 1972, Pub.L. 92–500, § 2, 86 Stat. 891, and amended Dec. 28, 1973, Pub.L. 93–207, § 1(6), 87 Stat. 906.*

APPENDIX C

40 CFR

"§ 35.965 *Enforcement.*

Noncompliance with the provisions of this subpart shall be cause for any one or more of the following sanctions, as determined appropriate by the Regional Administrator:

(a) The grant may be terminated or annulled pursuant to § 30.920 of this subchapter;

(b) Project costs directly related to the noncompliance may be disallowed;

(c) Payment otherwise due to the grantee of up to ten percent (10%) may be withheld (see § 30.615-3 of this subchapter);

(d) Project work may be suspended pursuant to § 30.915 of this subchapter;

(e) A noncomplying grantee may be found nonresponsible or ineligible for future Federal assistance or a noncomplying contractor may be found nonresponsible or ineligible for approval for future contract award under EPA grants,

(f) An injunction may be entered or other equitable relief afforded by a court of appropriate jurisdiction;

(g) Such other administrative or judicial action may be instituted as may be legally available and appropriate."

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-725

SOVEREIGN CONSTRUCTION COMPANY, LTD.,
Petitioner,

v.

CITY OF PHILADELPHIA,
Respondent.

REPLY OF PETITIONER TO THE BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

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Petitioner, Sovereign Construction Company, Ltd. (Sovereign) submits this Brief in reply to the Brief in Opposition filed by Respondent, City of Philadelphia (City).

The City, in its Brief in Opposition, quoting from the Opinion of the District Court, contends that Sovereign points to no specific regulation or statutory provision as the source of its federal causes of action, and has not invoked this Court's federal question jurisdiction (Brief in Opposition, p. 4).

The Complaint in this action makes repeated and express references to Title II of the Federal Water Pollution Control Act Amendments of 1972, Public Law 92-500, 33 U.S.C. § 1281, *et seq.* (FWPCA) and to Environmental Protection Agency regulations (¶¶ 14, 17, 18, 20, 22), as a basis for assertion of its legal rights (¶ 26). More importantly, the Opinion of the District Court, prefacing that contention, expressly recognized and stated:

> "Sovereign also asserts that its legal rights under the Federal Water Pollution Control Act Amendments of 1972 and under the EPA grant administration regulations have been violated by the City's actions."

Although jurisdiction of the Court was founded on diversity of citizenship and amount in controversy pursuant to 28 U.S.C. 1332, nevertheless, and contrary to the City's contention (Brief in Opposition, p. 6), Sovereign did invoke federal-question jurisdiction by the contents of its pleading. This Court has held that where facts alleged in the Complaint are sufficient to establish such jurisdiction, and a Complaint appears jurisdictionally correct when filed, it does not matter that the Complaint does not in so many words assert § 1331(a) as a basis of jurisdiction: *cf.* footnote 6 in *Andrus v. Charlestone Stone Products Co., Inc.*, ... U.S. ...., 98 S.Ct. 2002, 56 L.Ed. 2d 570 (1978). Thus, Sovereign is entitled to such benefits of federal substantive law as may be afforded by the provisions of the FWPCA.

The interest of Sovereign is within the zone of interests encouraged and protected by the FWPCA. Section 1251 of FWPCA (Brief in Opposition, Appendix B) sets forth a Congressional declaration of goals and policies for achieving control of water pollution. In Subsections (a) and (e) of the declaration it is stated:

> "(a) . . . In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter . . ."
>
> "(e) *Public participation in the* development, revision, and *enforcement of any regulation*, standard, effluent limitation, plan, or program *established by the Administrator* or any State under this chapter *shall be provided for, encouraged, and assisted by the Administrator* and the States. The Administrator, in cooperation with the States, *shall develop and publish regulations* specifying minimum guidelines *for public participation in such processes.*" (italics supplied)

The "zone of interest" is reflected in the action which was taken by the Regional Administrator. In reversing the City's rejection of all bids, the Regional Administrator in his Determination (to which the Brief in Opposition makes reference; pp. 3, 6), undertook to find *inter alia* that under the provisions of FWPCA and regulations enacted in conformity therewith, the right of a grantee of federal funds to reject all bids is not without limits, citing that the EPA has established as a matter of regulation a reliance on the procurement system of a grantee, with the important caveat that it must comply with minimum federal requirements, the first of which is articulated in 40 CFR § 35.936-3 to insure free and open competition, and that in this instance there was no ground shown for the rejection of all bids (Complaint ¶ 18).

The remedy which Sovereign seeks is fully consistent with and within the scope of the principles stated by the Court in *Cort v. Ash*, 422 U.S. 66, 45 L.Ed. 2d 26, 95 S.Ct. 2080 (1975). In *Cort*, the Court states that in determining whether a private remedy is implicit in a statute not expressly providing one, *several* factors are *relevant*. That does not imply that there are not other important and relevant factors nor does that statement imply that all of the *several* factors which are men-

tioned are necessarily required in every case. As to the *first*, while bidders and suppliers of labor and material for construction of water pollution control projects are perhaps not of the class "for whose *especial* benefit the statute was enacted" it is not reasonably fair to conclude that they therefore have no remedy against wrong-doing. That is consistent with FWPCA § 1365 authorizing Citizen suits and providing:

> "(e) *Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law* to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)." (italics supplied)

The *second* factor mentioned in *Cort* is the existence of any indication of legislative intent, explicit or implicit, either to create such a remedy *or deny one*. Certainly there is no explicit or implicit evidence of any intent *to deny* a remedy to a successful bidder on a FWPCA project—and from the declaration of Congressional goals and policies there is disclosure of at least an implicit intent that persons, including bidders who have been wronged, should not be denied an appropriate remedy in the courts of the United States to facilitate and promote the accomplishment of the national pollution control program. The *third* relevant factor mentioned by the Court in *Cort* is consistency with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff. Certainly a bidder on a water pollution control project who has been wronged by arbitrary and capricious action of a federal grantee should be accorded a judicial remedy which in turn should be recognized as consistent with the underlying purposes of the legislative scheme for construction of local projects with the assistance of federal funds. The *fourth* relevant factor suggested by *Cort* is whether the cause of action is one traditionally relegated to state law so that it

would be inappropriate to infer a cause of action based solely on federal law. Invocation of federal law for the protection of bidders upon projects being funded with federal money and in particular through federal grants, *traditionally* have not been relegated to state law for a cause of action.

Respectfully submitted,

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